UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PACIFIC COAST SIGHTSEEING TOURS & CHARTERS, INC., A WHOLLY OWNED SUBSIDIARY OF COACH, USA, INC., AND MEGABUS WEST, LLC, AN INDIRECTLY OWNED SUBSIDIARY OF COACH USA, INC. Respondents, and INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND TRANSPORTATION WORKERS – TRANSPORTATION DIVISION Charging Party.	NLRB Case Nos.: 21-CA-168811 21-RC-167379

SMART-TD'S ANSWERING BRIEF IN
OPPOSITION TO RESPONDENT PCST'S EXCEPTIONS

Pursuant to Section 102.46(b) of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (hereinafter "SMART-TD" or "the Union") submits this Answering Brief in Opposition to the Respondent Pacific Coast Sightseeing Tours and Charters, Inc.'s (hereinafter "PCST" or "the Employer") Exceptions to the Administrative Law Judge's ("ALJ") Decision and Recommended Order on Objections to the Election.[1]

The Employer filed 102 Exceptions on the erroneous basis that the ALJ's findings were not supported by substantial record evidence and consistent with Board precedent. As demonstrated herein, after a lengthy hearing, the ALJ properly applied controlling precedent to the facts in the record, and determined that the Employer violated Section 8(a)(1) of the National

[1] For ease of reference, the ALJ's Decision is hereinafter referred to as "Dec.".

Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. § 158(a)(1), by threats made on or about January 18 and 25, 2016. Therefore, the 102 Exceptions filed by the Employer have no merit and should be dismissed.

I. RELEVANT BACKGROUND

On January 8, 2016, SMART-TD filed a Petition to represent all full-time and part-time bus operators, mechanics, ticket agents, and bus washers employed at PCST's facilities in Anaheim, Bakersfield, and Van Nuys, California (Dec. at 3; GC Ex. 1(a)).[2]

On February 1, 2016, SMART-TD filed an unfair labor practice ("ULP") charge with the Board, after PCST engaged in threatening conduct it believed to be in violation of Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), during the months of December 2015 and January 2016 (Dec. at 3; GC Ex. 1(e)).

Pursuant to the parties' stipulated election agreement, an election was held at the Employer's three locations on February 4, 2016, and at the Anaheim facility on February 5, 2016 (Dec. at 16-17; Jt. Ex. 6). Of the 246 eligible voters, 73 voted for the Union and 118 voted against the Union (Dec. at 17).

On February 10, 2016, the Union timely filed Objections to PCST's conduct during the critical period and election, alleging, in part, that the Employer threatened the employees with discipline and job loss if the Union was selected as their representative (*Id.*).[3]

The Union amended the ULP charge on March 30, 2016, and on April 25, 2016, the Board issued a complaint and notice of hearing (GC Ex. 1(k)).

[2] On November 25, 2015, SMART-TD filed a petition to represent certain employees at the Employer's Anaheim, CA property (Dec. at 2; Jt. Ex. 4), which was subsequently withdrawn (Dec. at 2-3; Jt. Ex. 5).

[3] The Union raised six objections to the election; however, only Objection No. 1 was sustained.

On April 28, 2016, the Board issued a Report on Objections and Order Consolidating Cases and Notice of Hearing (GC Ex. 1(m)). Hearings were held on June 27-30, August 24-26, and September 12, 2016 (Dec. at 2). On March 17, 2017, the ALJ issued the Decision, finding Respondent PCST violated Section 8(a)(1) of the Act on or about January 18 and 25, 2016, "by informing employees that those who were not satisfied with their wages, hours or working conditions could quit or go work elsewhere"; and "by threatening to discipline employees or threatening to enforce disciplinary rules more strictly if the Union was selected as their representative" (Dec. at 26).[4] In so finding, the ALJ credited the testimony of General Counsel witnesses and PCST employees Juventino Santos and Demetris Washington regarding the statements made by PCST Safety Manager Haney Hana on Jan 18 about disciplinary action employees might face in the wake of the Union being selected; and credited the testimony of General Counsel witnesses and PCST employees Sylvia Lopez, Demetris Washington, and Daniel Romero regarding the statements made by Manager Hana on January 28 that employees who did not like the conditions or their pay could quit or go work elsewhere, and discredited the denials by Employer witnesses, Manager Hana and General Manager Kirstin Martinez. (Dec. at 8-14 (citing Tr. 441-43, 448, 451, 458, 462 (Lopez); Tr. 513-14, 520-22, 538-39, 541, 544 (Washington); Tr. 707-10 (Romero); Tr. 1081-1089, 1106 (Martinez); Tr. 1707-09, 1713-14, 1718-20, 1723 (Hana)); *see also* Dec. at 8-9 (citing Tr. 143-44 (Santos)). Based on controlling Board precedent, the ALJ further properly found that such objectionable conduct warranted a rerun election (Dec. at 26 (citing *Intertape Polymer Corp.*, 363 NLRB No. 187 (2016)).

[4] The ALJ additionally found that PCST did not engage in conduct alleged in paragraphs 6(a), (b), (d) and 7 of the Board's Complaint.

II. ARGUMENT

Unhappy with the Decision finding it violated Section 8(a)(1) for threatening statements made by its manager, the Employer attacks the Decision in 102 separately numbered Exceptions and its accompanying brief,[5] the overwhelming majority of which are based on the ALJ's credibility determinations (Exceptions ¶¶ 1-34, 36-39, 42-46, 49, 53-72, 79, 81, 86, 87).[6] As demonstrated herein, after nearly two weeks of hearings, the ALJ properly determined that the Employer violated the Act and ordered a new election (Exceptions ¶¶ 35, 42, 43, 44, 47-52, 74-78, 85-92, 102). Because the ALJ's findings are based on the record and in accordance with controlling Board precedent, they should not be disturbed.

1. The ALJ Properly Found that PCST's Threats violated Section 8(a)(1).

Contrary to PCST's assertions, the ALJ's finding that Manager Hana threatened employees on January 18 and 25, 2016, is supported by the record and Board precedent. The Complaint alleged that on or about January 18, 2016, PCST, through Manager Hana, "made an implied threat of discipline to employees if they selected the Union" (GC Ex. 1(k)). In concluding that PCST violated Sec. 8(a)(1) of the Act by engaging in such conduct, the ALJ found, in pertinent part:

> I credited the testimony of Santos and Washington that on that date, Hana stated that if the Union was selected, he would discipline employees for coming in 30 seconds late, and by stating that he would enforce rules more strictly than Respondent was currently doing. A threat, or implied threat, by an employer to

[5] PCST's Brief is hereinafter referred to as "PCST Br. at [page number]." In its Brief, PCST states that the issues for review are: whether the ALJ's findings that Manager Hana threated employees on January 18 and 25, 2016, is supported by the record and Board precedent, and whether the ALJ properly sustained the Union's Objection No. 1 based on its contention that any unlawful conduct was not enough to impact the results of the election (PCST Br. at 2).

[6] SMART-TD adopts and incorporates herein by reference the arguments set forth in the Counsel for the General Counsel's Answering Brief to Respondent's Exceptions (Exceptions ¶¶ 1-46, 53-73, 78-81, 85, 88-90, 93-101).

> enforce rules more strictly if employees select a union as their representative violates Sec. 8(a)(1) of the Act.

(Dec. at 15) (internal citations omitted). *DHL Express, Inc.*, which was relied upon by the ALJ here, is squarely on point. In *DHL*, the Board adopted the ALJ's findings that the employer violated the Act during the union's organizing campaign by threatening an employee with stricter enforcement of its tardiness policy if the union was selected as the employees' representative. 355 NLRB 1399, 1402-08 (2010) ("It is unlawful to threaten stricter enforcement of rules or policies because employees may vote to have union representation.") (citing *Miller Indust. Towing Equip.*, 342 NLRB 1074, 1082 (2004) (statement that rules would be enforced to the letter if the union came in held violative) (citing *Mid Mountain Foods*, 332 NLRB 229, 237-38 (2000), *enfd*., 269 F.3d 1075 (D.C. Cir. 2001))). As noted above, this precisely the kind of unlawful threat made by the Employer here.

The Complaint further alleged that on or about January 25, 2016, PCST, through Manager Hana, "threatened employees with job loss by telling them they could quit or go work elsewhere if they did not like the working conditions" (GC Ex. 1(k)). In concluding that PCST violated Sec. 8(a)(1) of the Act by engaging in such conduct, the ALJ found, in pertinent part:

> I credited the testimony of three employee witnesses who testified that on or about January 25, during the course of meetings attended by groups of employees, Hana had stated that employees who did not like the conditions or wages could quit and go work for other employers. I also credited the testimony of a fourth employee who testified that Hana said the same thing, albeit on January 18, which corroborated the other employees. The Board has found statements like the ones made by Hana to be unlawful because such statements imply a threat of job loss. *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB 170, 171 (2011); *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006); *McDaniel Ford, Inc.*, 322 NLRB 956, 962 (1997). The Board explained its rationale in *Jupiter Medical Center*, at 651:
>
> > The Board has long found that comparable statements made either to union advocates or in the context of discussions about the union violate Section 8(a)(1) because they imply that support for the union is incompatible with

> continued employment. *Rolligon Corp.*, 254 NLRB 22 (1981). Suggestions that employees who are dissatisfied with working conditions should leave rather than engage in union activity in the hope of rectifying matters coercively imply that employees who engage in such activity risk being discharged.

(Dec. at 16).

PCST's attempt to distinguish *Jupiter Medical Center* fails. In *Jupiter Medical Ctr.*, a manager made similar statements during company meetings held to discuss the union campaign. 346 NLRB at 651.[7] The ALJ found that the suggestion that the employee find other employment was ambiguous, and dismissed the allegation. *Id.* However, the Board noted that the manager "made the remark in the presence of a number of employees, thereby broadening its impact," and held that by suggesting that the employee leave rather than engage in union activity, the implied threats violated Section 8(a)(1). *Id*. To the extent that PCST relies on the finding that Jupiter "committed a number of unfair labor practices" (PCST Br. at 35), the Board explicitly stated: "we would not find that other, more severe, unfair labor practices are required to find a violation in this instance." 346 NLRB at 651. Similarly, here, in the presence of other employees at PCST-held meetings, Manager Hana threatened that employees who did not like the conditions or wages could quit and go work for other employers. The ALJ properly determined that such threats alone are unlawful.

A. Credibility Determinations are Left to the ALJ as the Trier of Fact.

Unable to otherwise escape the applicable law, the overwhelming majority of the Employer's Exceptions are based on its disagreement with the ALJ's credibility determinations (Exceptions ¶¶ 1-34, 36-39, 42-46, 49, 53-72, 79, 81, 86, 87). Indeed, the common theme

[7] The manager in *Jupiter* stated: "Maybe this isn't the place for you … there are a lot of jobs out there," and when questioned by the employee whether that was the solution, "If you are unhappy here, and you seem to be unhappy, then yes." *Id.*

throughout PCST's Exceptions and Brief is that the ALJ should have given more credence to its witnesses, and less to the General Counsel and Union witnesses (PCST Br. at 4-15, 27). However, "[t]he Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect." *DHL*, 355 NLRB at 1399 n.2 (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd*., 188 F.2d 362 (3d Cir. 1951)); *see also Keystone Auto. Indus.*, 365 NLRB No. 60, 2017 WL 1406209 at *1 n.2 (2017) (citing *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957)).

Initially, the ALJ laid out the proper governing Board standard on credibility:

> In assessing credibility, I must look to a number of factors, including but not necessarily limited to, inherent interests and demeanor of witnesses, corroboration of testimony and consistency with admitted or established facts, inherent probabilities, and reasonable inferences that may be drawn from a record as a whole. *Hill & Dales General Hospital*, 360 NLRB 611, 615 (2014); *Daikishi Corp.*, 335 NLRB 622, 633 (2001), *enfd.*, 56 Fed Appx. 516 (D.C. Cir. 2003). Moreover, in making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2nd Cir. 1950). In the present case, I have also taken into account the effects of the passage of time on memory, given that the testimony in this case took place some 6 to 9 months after the events in question, as well as the fact that numerous meetings were held during December 2015 and January 2016 (as further discussed below), resulting in the possible conflation of events in the minds of some witnesses.

(Dec. at 6-7) (emphasis added). He then carefully articulated the reasoning behind the decisions to either credit or discredit certain testimony (Dec. at 7, 8, 11-16, 22, 24). In crediting Santos and Washington's testimony regarding Manager Hana's statements on January 18, the ALJ specifically noted:

> First, their testimony was forthright and straightforward, and their demeanor reflected trustworthiness and candor; indeed, they admitted that Hana and Martinez also said things that might be detrimental to or diminish the General Counsel's case. Second, their status as current employees enhances their credibility, since they are testifying against their employer's interest and their own pecuniary interest. Third,

> not only did they corroborate each other's testimony, but I conclude that their testimony is also supported by the testimony of Torres, also a current employee, who had testified that Hana had made eerily similar statements during a December 2015 meeting. While I did not credit Torres' testimony that such statements were made by Hana in December, for the reasons I previously discussed, I did not discredit Torres' credibility, or find that such statement had never been made. Indeed, I explained that given the numerous meetings that employees attended during this period, it was likely that dates and events were conflated in the mind of some of the witnesses, particularly given the passage of time. I conclude that Torres indeed heard Hana make such statements, but that this most likely occurred during one of the January meetings, which were admittedly held for the purpose of discussing the Union. Indeed, Torres' testimony, in conjunction with that of Santos and Washington, tends to show that Hana engaged in a pattern of repetitive behavior at these meetings. Finally, I note that to some degree, Respondent's witness, Debyah, may have unwittingly helped corroborate Santos and Washington when he initially testified that Hana discussed how rules would be more strictly observed in the wake of the Union—only to reverse course during cross-examination and claim that he, not Hana, had brought that up. Accordingly, I credit Santos' and Washington's testimony, and do not credit Hana's and Martinez' denials that Hana made such statements.

(Dec. 11-12). Examination of the record confirms those findings. Furthermore, the ALJ's analysis is in line with existing Board precedent. *See DHL Express, Inc.,* 355 NLRB at 1404 n.13 ("The testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests.") (citing *Flexsteel Industries,* 316 NLRB 745 (1995); *Gold Standard Enterprises,* 234 NLRB 618, 619 (1978); *Georgia Rug Mill,* 131 NLRB 1304 fn. 2 (1961)).

To the extent that PCST complains that the ALJ erred when he discredited only portions of Torres' testimony (Br. at 7; Exceptions ¶ 53), as noted above, the ALJ did not discredit Torres' *credibility,* but rather discredited his *testimony* that such statements were made by Manager Hana in December (Dec. at 6). As the ALJ noted, it is well established that the trier of fact need not believe all of a witness's testimony. (Dec. at 6 (citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950)). Upon review of the record and applicable law, there is no basis to reverse the ALJ's findings.

2. PCST's 8(a)(1) Violation During the Critical Period Interfered with the Election.

The ALJ properly found that PCST's Section 8(a)(1) violation during the critical period, the period between the filing of the petition and the date of the election, interfered with the results of the election (Dec. at 17-18). The Board has long held that an "election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative." *See, e.g., General Shoe Corp.*, 77 NLRB 124, 126 (1948), *enfd.*, 192 F.2d 504 (6th Cir. 1951)). In *General Shoe*, the Board enunciated its "laboratory conditions" standard:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees…. When, in the rare extreme case, the standard drops too low, … the requisite laboratory conditions are not present and the experiment must be conducted over again.

Id. at 127. It therefore follows, and the ALJ properly found here, that "a violation of Section 8(a)(1) during the critical period is, a fortiori, conduct that interferes with the results of the election unless it is so de minimis that it is 'virtually impossible to conclude that [the violation] could have affected the results of the election.'" (Dec. at 17 (citing *Intertape Polymer Corp.*, 363 NLRB No. 187; *Super Thrift Market, Inc.*, 233 NLRB 409, 409 (1977); *Dal-Tex Optical Co.*, 137 NLRB 30 1782, 1786 (1962)); *see also Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 (1996), *enfd. in part,* 123 F.3d 899 (6th Cir. 1997) (applying "virtually impossible" standard in consolidated unfair labor practice and representation cases in which conduct found to violate Section 8(a)(1) is also alleged in election objections). Once again, the ALJ laid out the governing standard and properly applied the record evidence to that standard:

> In determining whether the unlawful conduct is de minimis, the Board considers a number of factors, including the number of incidents, their severity, the extent of dissemination, and the size of the unit. *Super Thrift Market*, supra at 409. I conclude that there was nothing de minimis about the conduct that occurred here. In that

> regard, I note that the statements I found violated the Act were made by Hana, a manager, in the presence of Martinez, another high-level manager, and were made during several mandatory meetings attended by 5 groups of employees. Coercive threats of discipline by a manager, heard by multiple employees on separate dates, cannot be considered de minimis in these circumstances.

(Dec. at 17-18) (emphasis added).[8]

In *Dal-Tex Optical Co.*, the Board examined objectionable statements made by the employer in three captive-audience speeches to employees, and found that the employer's threats "generated an atmosphere of fear of economic loss and complete hostility to the Union which destroyed the laboratory conditions in which the Board must hold its elections and prevented the employees' expression of a free choice in the election." 137 NLRB at 1787. Similarly, here, the record demonstrates that the Company held approximately 100 meetings in January 2016 for the purpose of discussing with employees its views as to why they should not support the Union and distributed voluminous amounts of literature as part of its campaign to persuade employees not to support the Union, and that PCST's manager made unlawful threats during *at least* two of those mid-January meetings (Dec. at 8 (citing Tr.1185–1186; 1199 (Martinez)); *see also* Dec. at 16 (noting four employees said the same thing regarding threats made by Manager Hana)). Such unlawful conduct is clearly not de minimis.

[8] Contrary to PCST's unsupported assertions (PCST Br. at 22-23; Exceptions ¶¶ 51, 52, 74-77, 85, 91, 92, 102), the ALJ found that the Employer's conduct here was not de minimis and did impact the election results (Dec. at 17-18). Therefore, the cases cited are inapposite. *See, e.g.*, *Columbus Transit, LLC*, 357 NLRB 1717, 1718 (2011) (noting "despite the general policy of directing a new election whenever an unfair labor practice occurs during the critical period, the Board does not set the election aside "where it is virtually impossible to conclude that the misconduct could have affected the election results"). In *Columbus Transit*, the Board held that it was virtually impossible to conclude that the employer's refusal to bargain could have affected the result of the election where the petitioner received 24 votes compared to five votes in favor of the Intervenor, and where the Intervenor made its request to bargain approximately a week before the election, the employer's refusal occurred two days before the election, and there was no evidence that employees were aware of the Intervenor's request or the employer's refusal. *Id.*

Advocating for application of a different standard, PCST erroneously relies on *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995), and *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004). (PCST Br. at 21-22; Exceptions ¶ 75). However, that standard is only applicable in representation proceedings where there has been no unfair labor practice allegation or finding, which is not the case here.

III. CONCLUSION

For the foregoing reasons, SMART-TD respectfully requests that the Board dismiss each of the Employer's Exceptions and adopt the ALJ's Recommended Decision in its entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on May 12, 2017, the foregoing document was electronically filed with the NLRB. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List, via electronic mail.

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